Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY D. BARNETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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May 26, 1994

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QUESTIONS PRESENTED FOR REVIEW

I.

The United States Court of Appeals for the Eleventh Circuit has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter.

II.

Whether the civil action seeking $50,500,000 from Barnette constitutes "punishment" for the purposes of the Double Jeopardy Clause in accordance with the Halper opinion as concluded by the District Court.

III.

Whether the government's damages as sought in the civil suit for the purposes of the Halper decision is synonymous with the "excess profits" received by Barnette as alleged by the government.

IV.

Can a Court of Appeal reverse the District Court on a discretionary matter for the District Court without finding that the District Court abused its discretion and how.

V.

Whether the prior criminal restitution order constitutes res judicata against a subsequent civil action.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

TABLE OF AUTHORITIES iii

OPINION BELOW vii

JURISDICTION vii

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED viii

STATEMENT OF CASE 1

QUESTION I. 9

QUESTION II. 14

QUESTION III. 26

QUESTION IV 35

QUESTION V 40

CONCLUSION 49

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

Blonder-Tongue Laboratories v. University Foundation, 402 U.S. 313, 324 (1971) 40

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981) 43

Green v. United States, 355 U.S. 184 (1957) 44

Keeble v. United States, 412 U.S. 205 (1973) 29

Lockerty v. Phillips, 319 U.S. 182 (1943) 30

North Carolina v. Pearce, 395 U.S. 736 (1979) 15

Townsend v. Burke, 335 U.S. 736 (1948) 30

United States v. Halper, 490 U.S. 435 (1989) . . . . Through Out

United States v. Hudson, 11 U.S. (7 Cranch) 32, 3 L.2d. 259 (1812) 29

United States v. Tucker, 404 U.S. 443 (1972) 30

Appeals Courts Decision:

In re: Kurth Ranch,
986 F.2d 1308 (9th Cir. 1993) . . 9, 10

United States v. Anglian,
784 F.2d 765 (6th Cir. 1986),
cert. denied, 479 U.S. 841 27

United States v. Angelica,
859 F.2d 1391 (9th Cir. 1988) 46

United States v. Barany,
884 F.2d 1255 (9th Cir. 1989) 46

United States v. Barnette,
800 F.2d 1558 (11th Cir. 1986)
cert. denied, 480 U.S. 935 (1987) . 1, 7

United States v. Barnette,
10 F.3d 1553 (11th Cir. 1994) . . 10, 26

United States v. Black,
767 F.2d 1334 (9th Cir.)
cert. denied, 474 U.S. 1022 (1985)31, 48

United States v. Gering,
716 F.2d 615 (9th Cir. 1983) 31

United States v. Hairton,
888 F.2d 1349 (11th Cir. 1989) . . . 48

United States v. Hill,
798 F.2d 402 (10th Cir. 1986) . . . 46

United States v. Hughey,
877 F.2d 1256 (5th Cir. 1989) 45

United States v. Keith,
754 F.2d 1388 (9th Cir. 1985) 31

United States v. Mayers,
897 F.2d 1126 (11th Cir. 1990) . . . 35

United States v. Matt,
838 F.2d 1356 (5th Cir. 1988) 31

United States v. Richard,
738 F.2d 1120 (10th Cir. 1984) . . . 30

United States v. Rone,
743 F.2d 1169 (7th Cir. 1984) 31

United States v. Woods,
949 F.2d 175 (5th Cir. 1991) 18

Other Citations:

18 U.S.C.A. sections 3663-3664 (1988) 45

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LARRY D. BARNETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, Larry D. Barnette, pro se, files this petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled proceeding on January 7, 1994.

OPINION BELOW

The opinion of the United States of Appeals for the Eleventh Circuit was entered on January 7, 1994, and is attached hereto as Appendix A.

JURISDICTION

Petitioner seeks review of an order and opinion dated January 7, 1994, of the United States Court of Appeals for the Eleventh Circuit, see infra Appendix A. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS:

U.S. Const., Fifth Amendment

STATUTES:

18 U.S.C.A. sections 3663-3664 (1985)

Rule 32 of the Federal Rules of Criminal Procedures

STATEMENT OF CASE

On August 30, 1983, a federal grand jury returned a twenty-five count indictment against Larry Barnette ("Barnette") and others on charges of fraud concerning a contract for laundry and dry cleaning services performed for the U. S. Army and N.A.T.O. forces in Germany.[1] After a three-month jury trial before the Honorable Susan H. Black in the United States District Court for the Middle District of Florida, Barnette was convicted and sentenced on various counts.

During the criminal trial and at sentencing, the government requested

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[1] The facts are outlined by the United States Court of Appeals, Eleventh Circuit in United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986).

restitution in the amount of $15 million. Barnette argued that because the government had entered into a "fixed-price" contract, the government had suffered no loss or in the alternative suffered damages of either $5 million or $6.8 million. The government's calculations were based on essentially a cost-plus analysis. These "fixed-price" contracts gave the contractor the incentive to minimize costs, yet required the contractor to bear the risk of inflation, strikes, etc. Barnette presented evidence that the "fixed-price" contracts cost over one million dollars less than the government "in-house" costs doing the exact laundry and dry cleaning services. Crim.R.-Defendant's Exhibit

255.[2]

On November 2, 1984, the government sought restitution of $15 million for its losses. R.14-246-2. On November 5, 1984, Judge Black sentenced Barnette to five years in prison and ordered him to

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[2] Barnette's position was the government had no damages or injury since it paid the contractor over one million dollars less than its in-house costs. The government's claim in the civil suit is based on what it would have paid if it had reverted Barnette's contract from a firm fixed-price contract to a cost-plus contract (which it never did).

The government's claim that it lost $15 million is calculated by ignoring the "fixed-price" nature of the contracts and by including a certain amount of profits from the first two years of the contracts which were competitively bid and properly audited by the government. The government's calculations are based on essentially a cost-plus analysis. The testimony of Allen Easterday, other government witnesses, and numerous exhibits in the criminal trial demonstrate the government's method of calculating its claim for $15 million was based upon a cost-plus analysis. Crim.R.-Gov.Exhibits 94-99; R.10-199-Appendix 1 (affidavit of Easterday).

pay $7 million in restitution on four separate counts concurrent with each other, additionally imposed probation for five years to begin upon his release from confinement. R.14-246-Exhibit B-35. Barnette was incarcerated for 39 months and has been on probation for over four years. Additionally, the government has taken the following actions against Barnette:

a) filing a complaint with the Florida Insurance Commissioner resulting in the seizure and subsequent forced sale of Old Dominion Insurance Company of Florida, one of Barnette's largest assets in which he had invested over three million dollars;

b) revoking the license issued under the Minority Enterprise Small

Business Investment Company Act by the Small Business Administration to Jets Venture Capital Corporation, another of Barnette's major assets;

c) a jeopardy assessment filed by the Internal Revenue Service against Barnette and his wife and children in an amount of more than $12 million;

d) a tax case resulting in a judgment and tax liens amounting to over $40 million;

e) a civil arrest petition for Barnette under the False Claims Act (this has only been used twice in the last 120 years and has not been used at all during the last 100 years).

This case arises from the government filing a civil action against Barnette,

four other individuals and nine corporate defendants on May 15, 1985, over nine years ago. During the past nine years, Barnette and two corporate defendants have been dismissed or released from the case.[3] The factual basis and the offenses charged in the criminal indictment are the same as the conduct and offenses upon which the civil action is based. R.10-202-2. In fact, the government attached the Indictment to the Complaint and incorporated the Indictment's allegations by reference. R.10-202-Exhibit D.

On October 8, 1986, the United States Court of Appeals for the Eleventh

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[3] One corporate defendant, Old Dominion Insurance Company of Florida, obtained a release from the government. R.3-46-1. The other corporate defendant, Old Dominion Corporation, S.A., was dismissed for lack of jurisdiction. R.15-140-1.

Circuit affirmed the judgment of the District Court in the criminal case, excluding a restitution order on one count imposed as part of the sentence. United States v. Barnette, 800 F.2d 1558, 1560 (11th Cir. 1986) (per curiam). Petitioner sought review by certiorari in the United States Supreme Court, which was denied on March 23, 1987. United States v. Barnette, 480 U.S. 935 (1987).

On February 7, 1991 in this civil action, the District Court granted Barnette summary judgment on the grounds that the relief sought by the government violated Barnette's constitutional right against double jeopardy based on this Court's holding in United States v. Halper, 490 U.S. 435 (1989). R.14-266-6. Four individuals and seven corporate defendants remain in the civil action

which is pending on the government's Seconded Amended Complaint filed on July 25, 1988.

I.

The United States Court of Appeals for the Eleventh Circuit has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter.

The United States Court of Appeals for the Eleventh Circuit in its decision in this case has construed the decision in United States v. Halper, 490 U.S. 435 (1989), in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in its decision in re: Kurth Ranch, 986 F.2d 1308 (9th Cir. 1993).

The United States Court of Appeals for the Eleventh Circuit has narrowly construed as being for the proposition that a civil case seeking a remedy from a defendant already convicted criminally is not violative of the Double Jeopardy Clause unless the ratio between the

amount the government seeks and the loss to the government is at least a ratio of 222 to 1 and anything less is not violative of the Double Jeopardy Clause. The Appeals Court stated in its decision in United States v. Barnette, 10 F.3d 1553 (11th Cir. 1994), at page 1559:

> The ratio between the total recovery sought and the Government's direct loss through the defendant's fraud was thus about 222 to 1.

Id. page B-30 of the Appendix.

The Court further stated at page 1559:

> If the Government is correct that Barnette's fraud caused the government $15.75 million in direct loss, then the ratio between the amount that the Government is seeking and its direct loss is only 3.2 to 1 - strikingly less than the 222 to 1 figure that so shocked the Halper Court.

Id. page B-34 of the Appendix.

The United States Court of Appeals for the Ninth Circuit in its opinion in re: Kurth Ranch has interpreted Halper more

generally. The Court at page 1311 stated:

> Under Halper, the double jeopardy analysis requires the trial court to determine whether there is a rational relationship between the sanction imposed and the damages suffered by the government. Although the trial court's determination may often be no more than an approximation, "even an approximation will go far towards ensuring both that the government is fully compensated for the costs of corruption and that, as required by the Double Jeopardy Clause, the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment." Id. at 450, 109 S.Ct. at 1903.
>
> * * *
>
> Where the case does involve a previous criminal conviction, however, special considerations come into play. Here, the most relevant consideration is the character of the sanction and whether it may fairly be called punitive in nature.

Using the Eleventh Circuit's narrow interpretation of Halper, the government could seek $3,480,750,000 and still not

violate the Double Jeopardy Clause because that would only be 221 to 1.

The Halper decision involved a loss of $585 plus cost or expenses totalling an approximately $16,000 and this was so disproportionate to the amount the government was seeking of $130,000 as to violate the Double Jeopardy Clause. The Eleventh Circuit erroneously interprets Halper as a 222 to 1 ratio when, in actuality, it is approximately an 8 to 1 ratio. The difference in actual moneys from the Halper facts is $114,000, whereas, the difference in the actual moneys from the Barnette facts is $34,750,000 (Halper: $130,000 - $16,000 = $114,000, Barnette: $50,500,000 - $15,750,000 = $34,750,000).

The government, in addition to the prosecution and conviction of Barnette

including the $7 million restitution, has taken a litany of other actions against Barnette that could conceivably be interpreted as punishment (see Statement of the Case, pages 3-5) and this civil action is just piling on punishment.

The great disparity in the two decisions of two separate Courts of Appeal is a special and important reason for the Supreme Court to grant this Petition for Writ of Certiorari. It will give the Supreme Court the opportunity to clarify the Halper rule so that all of the Courts of Appeals will be able to make consistent holdings.

II.

Whether the civil action seeking $50,500,000 from Barnette constitutes "punishment" for the purposes of the Double Jeopardy Clause in accordance with the Halper opinion as concluded by the District Court.

The Supreme Court had declared that there is a point beyond which civil penalties may become so punitive in nature as to violate the constitution's ban on subsequent punishments. In Halper the Supreme Court stated:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. 490 U.S. at 449-50. Halper developed a new rule which focuses on whether the civil sanction sought by the government after the imposition of a criminal

penalty bears a rational relationship to the goal of compensating the government for its loss. If so, double jeopardy is not violated. If, however, the civil sanction is so disproportionate that it "cross[es] the line between remedy and punishment," the Double Jeopardy Clause is implicated. Id. 490 U.S. at 550.

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U. S. Const. amend. V. There are three scenarios which run afoul of the double jeopardy bar[4]. The

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[4] The three scenarios are: (1) A second prosecution of an individual for an offense of which he already has been acquitted; (2) a second prosecution of an individual for an offense of which he already has been convicted; and (3) the imposition of multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

third scenario applies to this case: the imposition of multiple punishments for the same offense.

Barnette's case rests upon the Supreme Court's decision in Halper. Halper applies directly to this case because the government is attempting to impose a civil penalty for the underlying same offense which according to the District Court:

> The civil case before the Court today amounts to nothing more than an attempt to "reprosecute" the defendant.

Id. page A-12 of the Appendix.

In Halper the Supreme Court invalidated a civil penalty imposed subsequent to a criminal prosecution for essentially the same underlying offense. In Halper the District Court concluded that the Double Jeopardy Clause was implicated in light of the criminal

penalties previously imposed upon Halper and the disparity between the civil statutory penalty and the relatively small loss the government had actually sustained. The Supreme Court agreed in an unanimous opinion. Because a civil proceeding may serve punitive as well as remedial ends, the Court acknowledged that a sanction imposed in such a proceeding may constitute the sort of multiple punishment prohibited by the Double Jeopardy Clause. Id. 490 U.S. at 448. The Supreme Court held the proper inquiry was whether the sanction carried objective indicia of punishment. A civil sanction constitutes punishment when it furthers the dual goals of punishment - retribution and deterrence. Id. 490 U.S. at 448.

A civil remedy is not punishment

only so long as it does not serve the goals of punishment, mainly retributive and deterrence. United States v. Woods, 949 F.2d 175, 177 (5th Cir. 1991). After the criminal conviction in Barnette's pre-sentencing report, Barnette's financial statement showed a net worth of $5,191,416.[5] The government requested restitution of $15 million. After a hearing, Judge Black ordered Barnette to pay $7 million in restitution - 112% of his total assets. Barnette paid his entire net worth and an amount borrowed in order to pay the $7 million. Clearly when a person's entire net worth is

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[5] The financial statement showed total assets of $6,255,416. See also, page B-23 of the Appendix where the Appeals Court in its decision stated ". . . , we discover that Barnette had a known net worth of between $7 and $8 million -- approximately the amount of the restitution order."

forfeited to the government that must be considered punishment, and a second action requesting additional amounts must be considered a second punishment.

The Supreme Court in Halper held that a defendant who has been punished in a criminal prosecution may not be subjected to an additional sanction, even though civil, when the civil sanction is actually punitive in character. Whether a penalty in any given situation is punitive in character, as opposed to being merely civil depends upon the nature of the actual assessment. To assist courts in making this determination, the Supreme Court provided the following rule:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating

> the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Id. 490 U.S. at 449-50.

The Appeals Court ruled that the government's recovery of $43.7 million above the $7 million in restitution (or $34.75 million above the government's previously argued loss of $15.75 million) would not constitute additional punishment. The Appeals Court attempted to justify this position by using ratios instead of considering that an additional $34,750,000 to $43,700,000 is not punishment to the individual.

Using these figures, the Appeals Court held that if the government was successful in its argument, it was "only"

seeking a ratio of 3.2 to 1, or $34.75 million above its claimed losses and this would not "shock" the Supreme Court as it did in the Halper decision. Id. 10 F.3d at 1559-60; page B-33 of the Appendix.

In Halper, the defendant was convicted of sixty-five counts of submitting false claims. The District Court imposed a sentence of two years imprisonment and a fine of $5,000. The government did not seek restitution, but later brought a civil action against the defendant, asking for $130,000 in damages. That sum represented a $2,000 penalty pursuant to the False Claims Act, 31 U.S.C. sections 3729-3731 (1982) for each of the sixty-five false claims.

On direct appeal, the Supreme Court summarized double jeopardy precedent as

teaching that "the government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." Id. 490 U.S. at 446. However, the question remained as to whether a remedial sanction formula can be so disproportionate to the government's damages that the sanction becomes punitive in nature. In Halper, The Supreme Court said:

> remedial sanction that does not remotely approximate the Government's damages and actual costs, and rough justice becomes clear injustice.

Id. 490 U.S. at 446.

The Supreme Court held that "under

the Double Jeopardy Clause a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." Id. 490 U.S. at 448-49. Although recognizing that in many cases a statute allowing for a fixed penalty plus double damages could be roughly said to make the government whole, the Supreme Court found that the $130,000 penalty sought by the government in Halper bore no relationship to the government's actual losses.

The rationale supporting the Supreme Court's decision in Halper is that a civil penalty must be rationally related to the remedial purpose of making the government whole. When the penalty

sought is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment" the penalty constitutes a second punishment and violates the principles of double jeopardy. Id. 490 U.S at 442.

The rationale in Halper that a civil penalty must be roughly remedial reveals that the penalty in this case, tens of millions of dollars above the government's loss, is punitive in nature. "[I]n the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole." Halper, 490 U.S. at 449. The penalty sought in Halper was based on assessing a two thousand dollar penalty for each of the sixty-five false claims. Clearly, Halper was not the ordinary case. Neither is the case at

bar. In this case, the government seeks treble damages plus penalties on its claim of $15 million in loss plus penalties for a total of $50.5 million. When you consider Barnette's conviction, restitution, the other litany of punitive actions taken by the government and then a suit for civil treble damages, this is "Treble Jeopardy."

III.

Whether the government's damages as sought in the civil suit for the purposes of the Halper decision is synonymous with the "excess profits" received by Barnette as alleged by the government.

The District Court was correct in its determination and application of United States v. Halper, 490 U.S. 435 (1989). The Appeals Court was incorrect in its determination and the application of Halper. The Appeals Court erred when it reversed the District Court by ruling the restitution order of $7 million was not a "prior judicial determination." Id. United States v. Barnette, 10 F.3d 1553, 1555 (11th Cir. 1994); pages B-9 and B-10 of the Appendix. The Appeals Court mistakenly held the sentencing judge made no "factual finding" as to the total amount of the "government's loss." Id. pages 9 and 10 of the Appendix. Then

immediately the Appeals Court has a discussion of "excess profits." The terms "government's loss" and the contractor's "excess profits" are not the same thing and the Appeals Court confuses these terms. Congress did not intend restitution to be measured by the benefit received by the defendant; rather it intended the purpose of restitution was to make the victim whole. United States v. Anglian, 784 F.2d 765, 767 (6th Cir. 1986), cert. denied, 479 U.S. 841 (1987).

In trying over-zealously to reach a decision for the government, the Appeals Court ignores two major points: a) a District Court cannot order a person's entire net worth to be forfeited to the government without making a "prior

judicial determination"[6] and b) the Victim Witness Protection Act, 18 U.S.C.A. section 3663(a)(2) (1985), recodified at 18 U.S.C.A. Section 3553(c) (1993), requires that "[i]f the court . . . orders only partial restitution, the court shall include in the statement the reason therefor." The sentencing judge did not include any reason in the record, therefore, it must be assumed that full restitution was ordered - bringing the Double Jeopardy Clause into effect now.

If the sentencing judge did not make a "factual finding" regarding the amount of the government's losses when she

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[6] See Barnette's 1985 financial statement in the Pre-sentencing Investigation Report; page B-24 of the Appendix where the Appeals Court stated, "we discover that Barnette had a net worth of between $7 and $8 million - approximately the amount of the restitution order."

ordered restitution then the order of restitution must be void and vacated. Federal District Courts have no inherent power to order a convicted defendant to make restitution - and certainly without determining the victim's (U. S. Government) losses. Just as the federal courts have no inherent power to try criminal charges that are not based on a federal statute, United States v. Hudson, 11 U.S. (7 Cranch) 32, 3 L.2d. 259 (1812), the federal courts have no inherent power to impose punishment that is not provided for by a federal statute applicable to the offense for which the defendant was convicted. See also, Keeble v. United States, 412 U.S. 205, 215 (1973). The District Court's discretion to determine the punishment to be imposed on a defendant is

circumscribed by the sentencing limitation established by statute. United States v. Tucker, 404 U.S. 443, 446-47 (1972) and Lockerty v. Phillips, 319 U.S. 182, 187 (1943).

If a sentencing judge did not make a factual determination of the government's losses the restitution order must be void and vacated because restitution hearings are part of the sentencing process. See 18 U.S.C. section 3579(a)(1). Also, Townsend v. Burke, 335 U.S. 736, 741 (1948) (the Fifth Amendment and Due Process Clause applies to the sentencing process); United States v. Richard, 738 F.2d 1120, 1122 (10th Cir. 1984) (the Due Process Clause applies to restitution hearings). Due process is satisfied by affording the defendant an adequate opportunity to present his objections to

an order for restitution. United States v. Keith, 754 F.2d 1388, 1392 (9th Cir. 1985). The amount of restitution must be judicially established. United States v. Black, 767 F.2d 1334, 1344 (9th Cir.), cert. denied, 474 U.S. 1022 (1985); United States v. Gering, 716 F.2d 615, 625 (9th Cir. 1983). Courts have consistently held that an order of restitution was improper where there was no "plea agreement, judicial determination, or 'consensual means'" fixing the amount of restitution. United States v. Black, 767 F.2d at 1344. There must be a "factual basis . . . to support a specific amount." United States v. Matt, 838 F.2d 1356, 1359 n.4 (5th Cir. 1988). The amount of damages must be determined with certainty. United States v. Rone, 743 F.2d 1169, 1175-76 (7th Cir.

1984). If there is a dispute concerning the amount of restitution the V.W.P.A. requires a finding of fact by the court. Section 3580(d) (section 3664(d)). Further, 18 U.S.C. section 3480(a) (section 3664(a)) required the sentencing judge to conduct a restitution hearing and specific findings be made.

If the District Court did not make a judicial determination then the restitution must be returned to Barnette with interest. Finally on this point, Rule 32 of the Federal Rules of Criminal Procedure requires the sentencing judge to conduct an appropriate hearing, make specific findings and determinations as to each matter in controversy.

The government contends and has contended all along that Barnette received approximately $15,750,000 in

"excess profits." The government uses the "excess profits" as its loss. Actually, as discussed before, the government had no loss. It received the laundry services from Barnette at a figure more than one million dollars less than it was costing the government when it performed the same services itself. The "excess profits" can only be interpreted as the government's loss if you take the government's argument one step further and accept its contention that after the contract was completed it elected to convert the laundry contract to a cost-plus contract which it had not and was not done.

The Halper decision becomes even more protection under the Double Jeopardy Clause for Barnette if it is concluded that the government either had no loss or

that the $7,000,000 restitution fairly compensated the government for its loss. In any event, the District Court had the discretion of finding that the civil action did indeed violate Barnette's protection against double jeopardy and not the Appeals Court.

IV.

Can a Court of Appeal reverse the District Court on a discretionary matter for the District Court without finding that the District Court abused its discretion and how.

The District Court applied the Halper test to this case and found that the penalties sought by the government are punishment in nature:

> The government's attempt to seek treble damages amounts to nothing more than a further attempt to "prosecute" the defendant civilly. These "gross" civil penalties sought by the government herein unquestionably constitute punishment for the purposes of the Double Jeopardy Clause, United States v. Halper. See also United States v. Mayers, 897 F.2d 1126 (11th Cir. 1990) (adopting the double jeopardy principles of Halper).

Id. pages A-11 and A-12 of the Appendix.

First, the District Court found that the civil penalties sought from Barnette were based on the same conduct as the offenses charged in the criminal

proceeding. R.14-266-2. Second, the District Court found that the penalties sought rose to the level of criminal punishment because $50.5 million is grossly in excess of the government's loss. R.14-266-5.

A court's calculation of the size of a penalty which violates constitutional rights and protection does not turn on simple equations or ratios. The Supreme Court stated in Halper:

> We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment. (emphasis added)

Id. 490 U.S. at 550.

In this case the Appeals Court has taken that discretion away from the District Court without finding that the District Court abused the discretion.

The Appeals Court gives itself the privilege of reversing the District Court on such a discretionary matter by holding that the District Court clearly erred, not that it abused its discretion. The discussion by the Appeals Court as to why the District Court erred does not indicate at all that the error was connected to its discretion to determine that the size of the civil sanction crossed the line between remedy and punishment as mandated by the Halper decision.

The Appeals Court states that the error was that the District Court judge found that the sentencing judge clearly did not find that the restitution was full restitution and that even though it was partial restitution, the sentencing judge did not need to exercise her

statutory duty to explain less-than-full restitution because she may well have been unaware that one count came under the V.W.P.A. and, therefore, she would have felt no obligation under the V.W.P.A. to explain an award of less-than-full restitution. Id. pages B-21 and B-22 of the Appendix. Nowhere in the V.W.P.A. does it allow a sentencing judge to shirk her duty to explain because she may be unaware of its application or because she may feel no obligation to do so. It was her clear statutory duty to do so.

After extensive review of the record in the criminal case and numerous hearings in the civil cases, approximately 7 years experience with this civil case, the District Court Judge exercised reasonable discretion in

finding that the government's continued litigation of its claimed damages and its attempt to recover of $50.5 million from Barnette constitutes punishment in violation of the Double Jeopardy Clause and did not abuse its discretion.

V.

Whether the prior criminal restitution order constitutes res judicata against a subsequent civil action.

After a three month trial, over 100 witnesses and thousands of documents, the trial judge clearly had a full understanding of both parties' position and the issue of damages when she ordered restitution. Under the doctrine of res judicata, a party who has had one full and fair opportunity to prove a claim and has failed to prove that claim, should not be permitted to relitigate the merits of that claim in a second proceeding. Blonder-Tongue Laboratories v. University Foundation, 402 U.S. 313, 324 (1971). The doctrine bars a new suit on the same cause of action following a judgment by a court of competent jurisdiction. It bars a second proceeding on matters which

might have been litigated in the prior proceeding.

The Supreme Court has noted that the government may seek both criminal and civil penalties in the same proceeding. Nothing prevents the government from "seeking and obtaining both the full civil penalties and the full range of statutorily authorized criminal penalties in the same proceeding." Halper, 490 U.S. at 450.

In the criminal proceeding the government asked for (1) forfeiture of the assets of Barnette's corporations whose assets were valued at over twenty five million dollars, (2) over 100 years of incarceration, (3) $15 million in restitution, and (4) hundreds of thousands of dollars in criminal fines. The trial lasted nearly three months, the

second longest trial that had then been held in the Jacksonville Division of the Middle District of Florida. The government put on dozens of witnesses and presented volumes of evidence to substantiate its theory of the precise financial loss it claimed to have suffered.

The government received forfeiture of Barnette's interest in ninety percent of the common stock in Old Dominion Corporation, S.A., valued at over $6.5 million. It received $7 million in restitution, as well as nearly $2 million in interest[7]. Barnette served 39 months of a five year sentence of imprisonment. In addition, various other defendants in the criminal case paid hefty fines.

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[7] The forfeiture and restitution orders were credited against each other.

The common sense goal underlying the doctrine of res judicata is that litigation should have an end, and strife should not be prolonged. The Supreme Court has repeatedly stated that the doctrine "is a rule of fundamental and substantial justice, 'of public policy and the private peace' which should be cordially regarded and enforced by the courts . . ." Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981). Where parties have received a final judgment in a dispute, res judicata precludes them "from relitigating issues that were or could have been raised in that action." Id. 452 U.S. at 398. Having thoroughly litigated its damages in the criminal trial, and having sought and obtained various criminal penalties and make-whole remedies, the government

should be prevented from burdening this defendant and the judicial system with a second round of prolonged, complex litigation. One of the fundamental premises of double jeopardy, and by extension res judicata, is that

> [t]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . .

Green v. United States, 355 U.S. 184, 187-88 (1957).

The government "sought restitution of $15 million for its actual losses." R-14-266-2. Barnette argued that the government had no damages since he performed the German laundry and dry cleaning contract at a cost of over $1 million per year less than the

government's actual costs, thereby saving over $1 million per year for the government. Restitution was ordered, in part, under the Victim Witness Protection Act ("V.W.P.A."), 18 U.S.C. sections 3663-3664.

18 U.S.C. section 3663(a)(2) requires that if the District Court does not order restitution, or orders only partial restitution, the court shall state on the record the reasons therefore. Hence, if the court orders full restitution it does not have to state anything on the record. "Full" restitution is considered the norm thus not requiring explicit findings whereas restitution in part is deviation from the norm requiring explanation on the record. United States v. Hughey, 877 F.2d 1256, 1266 (5th Cir. 1989); 18 U.S.C. section

3663(a)(2) (now section 3553(d)).

The V.W.P.A. places responsibility for determining the amount of restitution on the sentencing court. United States v. Barany, 884 F.2d 1255 (9th Cir. 1989). In United States v. Angelica, 859 F.2d 1391, 1394 (9th Cir. 1988), the Court stated:

> The V.W.P.A. grants the sentencing judge substantial discretion over the entire process leading to the ultimate restitution order. See sections 3579(a),(d),(e)(1), (f)(1),(g); section 3580(b),(d).

In United States v. Hill, 798 F.2d 402, 405 (10th Cir. 1986), the Court held:

> The legislative history of V.W.P.A. (Act) indicated that Congress intended to enact a victim compensation scheme "to restore the victim to his or her prior state of well being" to the highest degree possible. S.Rep.No. 97-532, 97th Cong., 2d Ses. 30, re-printed in 1982 U.S. Code Cong. & Ad. News 2515, 2536.

18 U.S.C. section 3664(d) states:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of loss sustained by a victim as a result of the offense shall be on the attorney for the government.

There is no dispute that the issues in the Indictment are exactly the same as the issues in the civil complaint. See, e.g. R11-219. "The burden of demonstrating the amount of loss sustained by a victim shall be on the attorney for the government." Section 3664(d). The government's attorneys in the criminal case introduced numerous witnesses and exhibits at trial attempting to show the government's damages were $15 million. For example, see Government Exhibit 98-C and the testimony of Allen Easterday in the criminal trial. Barnette maintained that the government had no damages, in fact,

saved money by using a contractor.

Judge Black did what any District Court judge does. By using the preponderance of the evidence, she made a judicial determination. The method of judicial determination, as to the amount of damages, has been expressly approved by other Appeals Courts and is contemplated by Rule 32, Federal Rules of Criminal Procedure. See United States v. Black, 767 F.2d 1334 (9th Cir. 1985), cert. denied, 474 U.S. 1002 (1985). In United States v. Hairton, 888 F.2d 1349, 1353 n.7 (11th Cir. 1989), the Court stated the victim's loss can be established by proof at trial.

CONCLUSION

The Supreme Court should grant this petition for Writ of Certiorari because the decision of the Eleventh Circuit is in conflict with the decision of the Ninth Circuit on the same matter, that is the interpretation of this Court's opinion in Halper.

There are other significant reasons for granting this petition which include the Eleventh's Circuit's reversal of a discretionary decision of the District Court without finding any abuse of discretion in violation of the opinion by this Court in Halper.

The District Court exercised its discretion that the penalties sought by the government in the civil suit rose to the level of criminal punishment and, therefore, violated Barnette's double

jeopardy rights. That discretion should not be usurped by the Eleventh Circuit unless the District Court abused its discretion. This case has been "prosecuted" by the government for over eleven years and this defendant should be allowed to go in peace.

Appendix:

Order of District Court of
February 7, 1991 . . . . . A-1

Order of United States Court
of Appeals for the Eleventh
Circuit dated January 7, 1994 . . . B-1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. Case No. 85-754-Civ-J-16

LARRY D. BARNETTE, et al.

ORDER GRANTING SUMMARY JUDGMENT

The above-styled cause is before the Court on Defendant BARNETTE's Motion for Summary Judgment, filed herein on April 25, 1990. The United States opposed said motion on June 18, 1990.

For the foregoing reasons, the Court finds that Defendant BARNETTE'S motion should be granted.

Procedural History

Defendant BARNETTE was the "lead" defendant in a 25-Count indictment charging him with conspiracy to defraud the United States, "swindling" the United

States, submitting false statements, transporting money and securities through foreign commerce which were fraudulently obtained, bribing a public official, willfully misapplying a Minority Enterprise Small Investment Company loan, filing falsified corporation income tax returns, filing falsified personal income tax returns, and violation of the RICO Act. See United States of America v. Larry D. Barnette, et al., Case No. 83-131-Cr-J-14 (Black, J.). The Defendant was tried and convicted on Courts I, II, III, IV, V, VI, VII, VIII, X, XI, XII, XIII, XV, XVI, XVII, XVIII, XXIII, XXIV, and XXV. The judge, upon sentencing Defendant BARNETTE, ordered, inter alia, the Defendant to make restitution to the United States in the amount of seven million dollars. Authority for ordering

restitution may be found in 18 U.S.C. section 3663(a), the Victim and Witness Protection Act (VWPA), which states that:

> The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

Following Defendant BARNETTE's criminal conviction, the government commenced a subsequent civil action against him. The plaintiff-government is presently proceeding on its Second Amended Complaint filed herein on July 25, 1988.

Count I of the complaint at issue sets forth a claim for treble damages pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18

U.S.C. section 1964(b) and (c). The allegations in the civil complaint are a virtual summation of the criminal conduct comprising the 1983 criminal indictment.

Applicable Law

At the sentencing of Defendant BARNETTE on November 2, 1984, the government argued that the United States should be "made whole" for the damages it sustained and requested that the defendant be ordered to make restitution in the sum of $15,000,000.00. Such a request was made in accordance with the provisions of the Victim and Witness Protection Act, 18 U.S.C. sections 3663-3664.

Under the VWPA, the awarding of restitution is discretionary, 18 U.S.C. section 3663(a). Should the Court determine that restitution is

appropriate, the Court "shall consider the amount of loss sustained by any victim as a result of the offense." 18 U.S.C. section 3664(a). After presiding over the three-month trial and hearing argument of both counsel for the defendant and the government at BARNETTE's sentencing, the judge determined that the United States be paid; the sum of $7,000,000 in restitution. This method of "judicial determination," as to the amount of damages, has been expressly approved by the 9th Circuit and is contemplated by Federal Rule of Criminal Procedure 32. See United States v. Black, 767 F.2d 1334 (9th Cir. 1985), cert. den., 474 U.S. 1022 (1985) and United States v. Gering, 716 F.2d 615 (9th Cir. 1983). See also, Townsend v. Burke, 344 U.S. 736 (1948)

(dispute as to the proper amount of restitution is resolved by the Court). These factual findings by the sentencing judge in the prior criminal case most certainly work to estop the government from attempting to relitigate their alleged damages in this lawsuit.[1]

The government indicates that no statutory provision of the VWPA functions as a bar to a subsequent civil suit

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[1] The government is again arguing "that the amount of money needed to make the Government completely whole in the wake of defendant's fraud is greater than the $15 million damages suffered . . .," Government's Memorandum at 11-12; however, a prior judicial determination has already been made as to this exact issue. Furthermore, the government states that it "has also incurred extraordinary costs in investigating, prosecuting, and litigating the actions that arose from defendant's fraud" Memorandum at 12. Clearly, the government proceeded at its own peril by bringing this suit and cannot now turn around and "bill" the costs incurred to defendant Barnette.

against a defendant who has been ordered to make criminal restitution under the Act.

18 U.S.C. section 3664(e) states that:

> A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding . . . .

The defendant is in no way contesting that this suit is barred, not is the defendant attempting to relitigate the guilty verdicts in the prior criminal case. However, the facts of this case must be scrutinized to determine if the government is overstepping the constitutional boundaries which the Supreme Court addressed in United States v. Halper, 490 U.S. ___, 109 S.Ct. 1892 (1989) when bringing a subsequent civil suit under the Act. See also United

States v. American Diversified Defense, Inc., 702 F.Supp. 1551 (N.D. Ala. 1988) (estopping government from seeking restitution after prior criminal finding as to that issue).

In United States v. Welden, 568 F.Supp. 516 (N.D. Ala. 1983), rev'd sub nom. United States v. Satterfield, 743 F.2d 817 (11th Cir. 1984), cert. den., 471 U.S. 1117 (1985), the 11th Circuit noted that the legislative history of VWPA reenforced their conclusion that Congress intended to make restitution an element of the criminal sentencing process and not an independent action civil in nature. Id. at 837. The Court today does not by any means question Congress' intent nor question the statutory construction of the VWPA, but rather questions the application of the

Act to the facts in this case, especially in light of the recent Supreme Court case of United States v. Halper.

In Halper, the Supreme Court considered when a civil penalty may constitute "punishment" for the purposes of the Fifth Amendment's double jeopardy clause.[2] The Supreme Court opined that certain civil penalties may be so completely disassociated from the government's actual damages that the

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[2] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; not shall private property be taken for public use without just compensation. U.S. Const., Amdt. 5 (emphasis added).

imposition of subsequent civil penalties would amount to a violation of the Double Jeopardy Clause.

There is no doubt that the government as "made whole" by the order of restitution in the criminal case. Those essential findings of fact were made by the sentencing judge pursuant to 18 U.S.C. section 3664(a). Therefore, while it is admittedly true that Halper approves of subsequent civil suits seeking damages under the False Claims Act, this Court must examine the conduct of the defendant giving rise to the criminal conviction, the facts by which the sentencing judge determined the restitution sum, and the underlying cause of action in the pending civil suit. When the three are so inextricably intertwined as they are in the instant

case, the Court must determine if the civil action is functionally a second prosecution.

The Court does not believe, contrary to the government's inferences, that defendant BARNETTE is arguing he is a "small-gauge offender." In fact, the Court recognizes the magnitude of BARNETTE's crime and does not condone the conduct that Barnette engaged in which gave rise to his conviction. However, factual findings have been made as to the issue of restitution in the criminal case, and it is manifestly unjust to allow the government to relitigate restitution again in this suit because of their apparent displeasure with the $7,000,000.00 order in that case. The government's attempt to seek treble damages amount to nothing more than a

further attempt to "prosecute" the defendant civilly. These "gross" civil penalties sought by the government herein unquestionably constitute punishment for the purposes of the Double Jeopardy Clause. United States v. Halper. See also United States v. Mayers, 897 F.2d 1126 (11th Cir. 1990) (adopting the double jeopardy principles of Halper).

Conclusion

The civil case before the Court today amounts to nothing more than an attempt to "reprosecute" the defendant. Factual findings were made by the sentencing judge with respect to the appropriate amount of restitution, United States v. Barany, 884 F.2d 1255 (9th Cir. 1989), and the government simply chose not to appeal that order of restitution. To allow the government to do so at this

juncture is certainly more in the nature of punishment than a bona fide and legitimate method of seeking justifiably recoverable losses.

There is no double that Halper is dispositive as to the issue of double jeopardy as applied to the facts of this case. The government is barred under the Fifth Amendment from bringing this civil action which clearly alleges conduct identically prosecuted in a prior criminal proceeding. The government's overzealousness amounts to nothing more than an attempt to trample upon the constitutionally protected rights of defendant BARNETTE. Litigation of this sort brought by the government simply cannot be tolerated in our system of jurisprudence.

Accordingly, it is now

ORDERED AND ADJUDGED:

1. That this Court's Order Granting Summary Judgment dated June 27, 1990 is hereby VACATED.

2. That defendant LARRY BARNETTE'S Motion for Summary Judgment is hereby GRANTED.

3. That this order shall be immediately appealable pursuant to 28 U.S.C. section 1292(b) because it involves a controlling question of law as to which there is substantial grounds for difference of opinion, and an immediate appeal may materially advance the ultimate termination of the litigation. Under section

1292(b), an appeal must be taken within ten (10) days of the date of the date of this order.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 5 day of December, 1990.

/s/ John H. Moore, II
UNITED STATES DISTRICT JUDGE

Copies to:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v. CASE NO. 91-3206

LARRY D. BARNETTE,

Appellee.

January 7, 1994

In this civil action the Government seeks damages from Appellee Larry D. Barnette, who has previously been convicted and sentenced for defrauding the Government. The district court granted summary judgment for Barnette based on its holding that the Government is barred from recovering damages in excess of the amount of restitution Barnette was ordered to pay in the

criminal proceeding. We now reverse the district court's decision and remand for further proceedings, including a determination of the total loss that Barnette's crimes caused the Government, so that the doctrine of *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), may be applied properly.

I. BACKGROUND

Between 1977 and 1981, Barnette and his associates defrauded the United States of millions of dollars through a complex conspiracy involving, among other things, a government contract for laundry services for the United States Army in Germany. The details of Barnette's many crimes are recounted in *United States v. Barnette*. 800 F.2d 1558, 1560-66 (11th Cir.1986) ("*Barnette I*"), *cert. denied*,

480 U.S. 935, 107 S.Ct. 1578, 94 L.Ed.2d 769 (1987). In 1984, a jury convicted Barnette on 17 counts, including racketeering, mail fraud, bribery, false statements, income tax evasion, and misapplication of government funds. The jury convicted several co-conspirators as well. *Id.* at 1560.

At sentencing, the United States sought an order requiring Barnette to pay restitution of $15 million, the Government's estimate of Barnette's excess profit. Barnette disputed the Government's estimate, contending that his illegal profit was at most $6.8 million. Without resolving the parties' dispute, the district court ordered Barnette to pay $7 million in restitution. The district court also sentenced Barnette to five years in

prison and another five years on probation.

On direct appeal, we affirmed Barnette's convictions and, with one minor exception, the sentencing judge's restitution order. *Barnette I*, 800 F.2d at 1572. In doing so, we stated that "the evidence introduced at trial established that the conspiracy netted approximately fifteen million dollars in excess profits from the German laundry contract alone." *Id.* at 1571-72.

After Barnette's criminal conviction, the Government filed this civil action against Barnette and his co-conspirators, asserting claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. section 1964 (1984 & Supp.1993), the False Claims Act, 31 U.S.C.A. section

3729 (1983 & Supp. 1993), and various common law theories. The Government's present claims arise from the same conduct for which Barnette was convicted. The Government alleges that Barnette's illegal actions caused the United States to suffer at least $15,750,153 in direct loss. At oral argument, the Government also asserted that it has incurred substantial investigation and prosecution costs as a result of Barnette's fraud. The Government now seeks between $18.1 million and $50.5 million from Barnette, depending upon the theory of recovery. (The Government theories of recovery and prayers for relief are set out in the Appendix to this opinion.) At oral argument, the Government conceded that Barnette may offset the $7 million in restitution that he already paid as part

of his criminal sentence against any new civil judgment.

The district court granted Barnette's motion for summary judgment against the Government. The court, through a judge different from the one who had sentenced Barnette, decided that the sentencing judge's restitution order constituted a finding of fact that the Government had lost only $7 million. The court reasoned that this sentencing finding estopped the Government from relitigating the amount of its damages. Citing *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), the district court concluded that, because Barnette had already been tried and sentenced, awarding the Government treble damages in this case would subject him to a second punishment

in violation of the Double Jeopardy Clause.

Although numerous counts remain against other defendants, the district court certified its summary judgment order for immediate interlocutory review pursuant to 28 U.S.C.A. section 1292(b) (1993), and we permitted the appeal. Because we conclude that the sentencing judge never determined the extent of the Government's loss, we now reverse the order granting summary judgment and remand for findings on the amount of the Government's loss and for reconsideration of Barnette's summary judgment motion in light of those findings and this opinion.

II. DISCUSSION

The Government contends on appeal that the district court erred in holding

that the Double Jeopardy Clause [1] and the doctrine of collateral estoppel bar recovery under this civil suit. We exercise plenary review over the district court's findings of fact for clear error. *E.g., Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1244 (11th Cir. 1991); *Balbirer v. Austin*, 790 F.2d 1524, 1526 (11th Cir. 1986).

A. DOUBLE JEOPARDY

The district court held that recovery in this civil suit would violate Barnette's double jeopardy rights. The court reasoned that, because the Government has already received full compensation from Barnette's restitution sentence, the present case was "nothing

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1. "[N]or shall any person be subject for the same offence to be twice in jeopardy of life of limb...." U.S. Const. Amend. V.

more than a further attempt to 'prosecute' the defendant civilly." We now consider whether the Government's effort to obtain further compensation in this case is such an attempt.

1. Sentencing Judge's Restitution Order

The district court concluded that the sentencing judge's $7 million restitution order constituted a "prior judicial determination" of the amount of the Government's loss. This conclusion underpins the remainder of the district court's summary judgment order, so we address it as a threshold issue.

The parties dispute whether we should treat the district court's interpretation of the sentencing judge's order as a finding of fact or a mixed finding of law and fact. We need not resolve this dispute. After reviewing

this case, "we are left with a definite and firm conviction that a mistake has been committed." *United States v. Roy*, 869 F.2d 1427, 1429 (11th Cir.), *cert. denied*, 493 U.S. 818, 110 S.Ct. 72, 107 L.Ed.2d 38 (1989). Because the district court's conclusions are clearly erroneous, we must reverse even if the more deferential standard of review is applicable.

The sentencing judge carefully voided making factual findings as to the total amount of the Government's loss. As initially drafted, Barnette's presentence report stated that the defendants criminal activities earned them "approximately $15,000.000 of excess profits to which they were not entitled." Barnette objected to the original report's assessment of the evidence and

asked the judge to leave the amount of the Government's loss undecided "[r]ather than conduct[ing[an extensive hearing on the point." The judge agreed. During the sentencing hearing, she ordered the probation department to revise the presentence report to set forth both the Government's and Barnette's position on the issue, and to state specifically that neither she nor the probation department would resolve the dispute. As revised according to the sentencing judge's express instructions, the final presentence report read, in pertinent part:

> The Government maintains that the evidence shows that defendants made false and fraudulent statements relating to costs that allowed $15,000,000 in excess profits. Defendants maintain that the evidence shows that the German laundry contract was a fixed price contract and the defendants were not limited to a specific profit amount

> of 10%. The defendants maintain that a profit of $6,851,134.00 over and above the 10% profit figure was made in fiscal years 1979, 1980 and 1981. *The Court and Probation Office make no specific finding as to an amount of excess profits'* that may or may not have been made under the German laundry contract. [emphasis added]

In the face of these events, Barnette argues that the sentencing judge determined the magnitude of the Government's loss later in the sentencing hearing. According to Barnette, when the sentencing judge decided "that the proper amount of restitution was $7 million, she implicitly rejected the government's calculation of loss." Barnette argues that his view of the judge's restitution order can be inferred from that order and is also supported by a statutory presumption.

[1] We first reject Barnette's

inference argument. Although Barnette offers one possible explanation of the sentencing judge's ruling, it is neither the only nor the most persuasive interpretation. An order of restitution is not a judicial determination of damages. Damages measure the amount of compensable loss a victim has suffered. Restitution, by contrast, is an equitable remedy, "subject to the general equitable principle that [it] is granted to the extent and only to the extent that justice between the parties requires..." Restatement of Restitution ch. 8, topic 2, introductory note, at 596 (1936); *accord Williams v. Washington Metro. Area Transit Comm'n,* 415 F.2d 922, 944 (D.C.Cir.1968) ("[R]estitution is not a matter of right, but is 'ex gratia, resting in the exercise of a sound

discretion'...") quoting *Atlantic Coast Line R.R. V. Florida,* 295 U.S. 301, 310, 55 S.Ct. 713, 717, 79 L.Ed. 1451 (1935)), *cert. denied,* 393 U.S. 1081, 89 S.Ct. 860, 21 L.Ed.2d 773 (1969); *cf Frederick County Fruit Growers Assoc. v. Martin,* 968 F.2d 1265, 1274 (D.C.Cir 1992) (holding that "less than full restitution is appropriate in certain circumstances"); *Thompson v. Washington,* 551 F.2d 1316, 1319 (D.C.Cir.1977) ("[T]he general principles governing the shaping and review of equitable decrees are fully applicable to awards of restitution.") For example, the Victim and Witness Protection Act of 1982, Pub.L. No. 97-291, 96 Stat. 1253, 1255 (now codified at 18 U.S.C.A. sections 3663-3664 (1985 & Supp.1993)) ("VWPA"), specifically directs a sentencing judge

to consider not only the victim's injury, *but also* "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C.A. section 3664(a) (1985 & Supp. 1993).

[2] Barnette's attempt to equate the sentencing judge's restitution order with a determination of damages is therefore unpersuasive. More likely, the sentencing judge decided that the Government had lost *at least* $7 million and that Barnette could pay that amount, but left final resolution of the Government's damages claim to the ensuing civil case. This interpretation of the judge's decision comports with her disavowal that same morning of a

determination of the Government's total loss. Barnette's approach, by contrast, would require us to read the sentencing judge's *silence* at one moment as an intention to do implicitly that which she had expressly disavowed any intention of doing just a few minutes earlier.

If the parties and the sentencing court had been under the impression that the Government's only chance of recovering its losses from Barnette was through the restitution order, there might be some reason to infer that the court had set restitution at the total amount of the loss. The facts, however, are just the opposite. The transcript of the sentencing hearing indicates that the sentencing judge knew that the Government had brought civil claims against Barnette. In fact, in his sentencing

memorandum, Barnette argued against restitution on the ground that the Government was seeking to recover damages in civil actions.

Our reading of the sentencing court's actions is also more compatible than Barnette's with this Court's statement in the criminal appeal that "the evidence introduced at trial established that the conspiracy netted approximately fifteen million dollars in excess profits." *Barnette I*, 800 F.2d at 1571-72. Because an appellate court does not find facts, *see, e.g., Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986), this Court's previous statement must be read as upholding the $7 million restitution order on the ground that the evidence would have

supported at least $15 million in restitution. Nowhere in the opinion did we intimate that the sentencing judge had found the loss to be only $7 million, and the opinion's assessment of the evidence is inconsistent with such a proposition.

Barnette also proffers a statutory argument for his contention that the sentencing judge determined the Government's total loss to be only $7 million. As Barnette notes, the VWPA requires a judge who orders partial restitution under the Act to explain on the record her reasons for not providing full restitution. 18 U.S.C.A. section 3663(a)(2) (1985), *repealed by* Pub.L. 99-646, section 8(b) (1986), *recodified* at 18 U.S.C.A. section 3553(c) (Supp. 1993); *see also United States v. Hairston,* 888 F.2d 1349, 1352 (11th Cir.1989) ("The

VWPA does not explicitly require the court to assign reasons for its determination unless the court does not order restitution or orders only partial restitution.") Barnette asserts that the sentencing judge in his case did not offer such an explanation and therefore must have intended to award full restitution. Any other reading, he suggest, would require us to find that the sentencing judge violated her statutory duties.

Barnette's VWPA argument in unpersuasive. First, the VWPA does not clearly control this case. The sentencing judge imposed five concurrent $7 million restitution orders, of which we upheld four on direct appeal. *See Barnette I*, 800 F.2d at 1570-71. Three of those four restitution orders were for

crimes that occurred before the effective date of the VWPA, and were therefore not governed by its provisions. As we have already implicitly held, *see id.* at 1570, those three restitution orders were each made pursuant to 18 U.S.C.A. section 3651 (1985 & Supp. 1993), *repealed by* Pub.L. 98-473, Title II, section 235(a)(1), 98 Stat. 2031 (Oct. 12 1984) (effective Nov. 1, 1987). Section 3651 did not require a judge to explain a less-then-full restitution order. Therefore, Barnette's statutory argument is inapposite with respect to three of the four concurrent restitution orders.

Although the remaining restitution order was subject to the VWPA, that might not have been apparent prior to our holding on appeal. *See Barnette,* 800 F.2d at 1571. At sentencing, the

Government mistakenly stated that Barnette's crimes had been completed before the VWPA took effect. More specifically, counsel for the Government told the sentencing judge: "Congress recently passed a new law dealing with restitution.... That, of course, deals with the crimes that have occurred after the one that we have here. But I think it's instructive to note that Congress thinks that is an important part of the sentencing process in principle anyway." Neither the court nor Barnette contested the Government's assertion that the VWPA did not apply to the case. *See* 800 F.2d at 1571 (rejecting part of Barnette's appeal on the ground that the VWPA did apply). In light of this uncertainty at the time of sentencing, the sentencing judge may well have been unaware, just as

the Government and Barnette were unaware, that the VWPA was applicable to any part of the case. If so, she would have felt no obligation under the VWPA to explain an award of less-than-full restitution.

The sentencing judge's own statements provide particularly strong evidence that she was unaware of any VWPA obligation. Shortly before ordering restitution, the judge expressly refused to determine the total amount of the Government's loss. We know that, had she been aware that the VWPA applied to any of the restitution counts, and of the resulting duty to explain less-than-full restitution, she would not have disavowed any intent to calculate the figure required for full restitution.

In any event, we are not at a loss to explain how the sentencing judge

arrived at the $7 million figure at which she set restitution. The judge stated at sentencing: "The jury's verdict would support a finding that the proceeds from the crime were placed in the Old Dominion Corporation. Even the Defendant states that Old Dominion's worth is approximately six million five hundred thousand dollars." Because Barnette owned a majority stake in Old Dominion, the judge's words suggest that she was estimating Barnette's financial resources. Indeed, when the judge's estimate of Old Dominion's value is factored into the presentence report's assessment of Barnette's known assets and liabilities, we discover that Barnette had a known net worth of between $7 and $8 million--approximately the amount of the restitution order. It is therefore

reasonable to interpret the sentencing judge's comments as explaining that she was ordering $7 million in restitution because that was an amount that was an amount that Barnette could pay.[3]

The district court clearly erred in determining that the sentencing judge had made a factual finding that the Government's loss from Barnette's crimes was only $7 million. The sentencing

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2. It may well be that this explanation by the sentencing judge would satisfy the VWPA, which in addition to an explanation of less-than-full restitution also requires that a judge, in setting restitution, "shall consider the... financial resources of the defendant, ... and such other factors as the court deems appropriate." 18 U.S.C.A. section 3664(a) (1985 & Supp. 1993). However, we need not decide whether the VWPA's explanation requirement was satisfied here. The only issue before us is whether the sentencing judge found the Government's total loss to be only $7 million. It is clear that she did not.

judge expressly disavowed such a finding, and neither the district court nor Barnette have offered any reason for us to doubt the sincerity of her disavowal. The record is wholly consistent with the expressed intention of the sentencing judge not to resolve the damages dispute.

2. Barnette's Double Jeopardy Claim

[3] Barnette claim, and the district court held, that any civil penalties that the Government might win from Barnette in excess of the criminal restitution order would violate the Double Jeopardy Clause of the Fifth Amendment. We disagree.

Although civil actions for damages are by no means an unusual follow-up to criminal proceedings-and are expressly

contemplated by the VWPA, *see* 18 U.S.C.A. section 3663(e)(2) (1985) (providing for offsets in civil actions of the amounts of restitution paid in criminal proceedings)--the Supreme Court has declared that there is a point beyond which civil penalties may become so punitive in nature as to violate the constitutional ban on subsequent punishments. The controlling law on this issue is found in *United States v. Halper*, 490 U.S. 435, 448-50, 109 S.Ct. 1892, 1902, 104 L.Ed.2d 487 (1989). Under *Halper*, the question we must decide is whether the civil penalty sought by the Government from Barnette is so grossly disproportionate to the amount of loss suffered as to constitute deterrence or retribution instead of compensation. *Id.*

We are not now in a position to decide that question. As discussed in Part II.A.1, above, Barnette's sentencing judge never determined the total amount of the Government's loss, although she must have believed it to be at least $7 million. On direct appeal, we observed that the evidence presented at trial-which did not include evidence regarding the Government's investigation and prosecution costs-would have supported a finding that the loss was as high as $15 million. However, we did not then, and do not now, specifically determine the Government's direct loss or its total loss, which would include investigation and prosecution costs. It is not an appellate court's role to find facts. *E.g., Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 714, 106 S.Ct.

1527, 1530, 89 L.Ed.2d 739 (1986). That is a function of the district courts. Therefore, to the extent that the Government's complaint is not foreclosed on its face, we must remand for further fact finding. Of course, if *Halper* forecloses the Government from recovering the civil penalties it now seeks even if it did lose as much as it claims, then there is no point in remanding for what would be an irrelevant factual determination. The government seeks between $18,570,153 and $50,525,279 (in direct loss damages, treble damages, and statutory penalties), plus costs. See Appendix. While we do not know the amount of the Government's investigation and prosecution costs, we can determine whether a total recovery of $50.5 million would violate the double Jeopardy Clause,

assuming the Government suffered at least $15,750,153 in direct damages, as it claims.

In *United States v. Halper* a unanimous Supreme Court held that the Double Jeopardy Clause protects a defendant who has already been punished in a criminal prosecution from an additional civil sanction that is deterrent or retributive rather than remedial. 490 U.S. at 448-49, 109 S.Ct. at 1902. The defendant in *Halper* had submitted $585 in false Medicare claims, for which he already had been sentenced. 490 U.S. at 437, 109 S.Ct. at 1896. the Government then filed a civil case seeking an additional civil fine of $130,000 under the False Claims Act. 490 U.S. at 438, 109 S.Ct. at 1896. According to the trial court, the

Government's total injury-including detection and investigation costs-totaled about $16,000. 490 U.S. at 439, 109 S.Ct. at 1897. The ratio between the total recovery sought and the Government's direct loss through the defendant's fraud was thus about 222 to 1. The ratio between the total recovery sought and the Government's total loss, including detection and investigation costs, was just over 8 to 1.

Faced with a "stark situation" in which the civil fine would have been "exponentially greater than the amount of the fraud" and "many times the amount of the Government's total loss," the Supreme Court balked. 490 U.S. at 445, 109 S.Ct. at 1900. On these facts, the Court held, the "supposedly remedial sanction ... [did] not remotely approximate the

Government's damages and actual costs," and "rough justice [had become] clear injustice." 490 U.S. at 446, 109 S.Ct. at 1901. Since Halper had already been tried and sentenced for the same activities, the Court ruled that a $130,000 fine would violate the constitutional prohibition on subsequent punishments. 490 U.S. at 448-49, 109 S.Ct. at 1902. More generally, the Supreme Court held that "if a civil penalty sought in [a] subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss," but is instead punitive, "then the defendant is entitled to an accounting of the Government's damages and costs to determine ... the size of the civil sanction the Government may receive without crossing the line between

remedy and punishment." 490 U.S. 449-50, 109 S.Ct. at 1902; *see also United States v. Mayers,* 897 F.2d 1126, 1127 (11th Cir.), *cert. denied,* 498 U.S. 865, 111 S.Ct. 178, 112 L.Ed.2d 142 (1990)(holding that the Double Jeopardy Clause may be triggered where a "civil penalty rose to the level of criminal punishment because of the lack of rational relation to the Government's loss").

Nevertheless, the *Halper* Court carefully limited its holding, which it called "a rule for the rare case." 490 U.S. at 449, 109 S.Ct. at 1902. the Court emphatically denied any intention to limit the Government to the recovery of direct damage, exclusion of ancillary costs. On the contrary, the Court explicitly "recognized that in the ordinary case fixed-penalty-plus-double

damages provisions can be said to do no more than make the Government whole." *Id.* It considered such formulas a necessary aspect of "rough justice." *Id.* Echoing this point in concurrence, Justice Kennedy noted that "[our] rule permits the imposition in the ordinary case of *at least* a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount, plus double damages." 490 U.S. at 452-53, 109 S.Ct. at 1904 (emphasis added).

Despite the undeniably large sums at stake, the present case is "ordinary" as that term was used in *Halper.* Here, unlike in *Halper,* the civil penalty is not exponentially exaggerated by a fixed penalty disproportionate to the defendant's actual fraud. Assuming that the government can prove that it has lost

as much as it claims, even an award of $50.5 million in restitution against Barnette would not constitute a second punishment violative of the Double Jeopardy Clause. If the Government is correct that Barnette's fraud caused the Government $15.75 million in direct loss, then the ratio between the amount that the Government is seeking and its direct loss is only 3.2 to 1- strikingly less than the 222 to 1 figure that so shocked the *Halper* Court. Because the Government has not averred the amount of its investigation and prosecution costs, we cannot determine the ratio between the total recovery sought here and the Government's total loss, including those costs. It is clear, however, that this ratio would not exceed 3.2 to 1 even if there were no ancillary cost. In other

words, the ratio in this case between the total recovery sought and the Government's total loss will never approach *Halper's* 8 to 1 ratio. And a 3.2 to 1 ratio simply does not lack a "rational relation to the Government's loss." *Mayers,* 897 F.2d at 1127. Instead, such a ratio is very close to "a fixed penalty roughly proportionate to the damage caused ... plus double damages." *Halper,* 490 U.S. at 452-53, 109 S.Ct. at 1904 (Kennedy, J., concurring). The rule of *Halper* permits "at least" that much. *Id.,* 490 U.S. at 453,109 S.Ct. at 1904.

Seeking refuge from the result of a proportionality analysis, Barnette also contends that in a case of this magnitude we should consider the *absolute* amount by which the total recovery sought exceeds

the Government's total loss, rather than a ratio of these figures. We do not dispute that the amounts claimed by the Government are large, but they are not disproportionate, and proportionality is the key. In a case in which the plaintiff sought penalties of $13 billion, Justice Stevens observed:

> [T]he exceptional magnitude of those consequences is the product of the vast size of Texaco itself . . . and the immensity of the transaction that gave rise to the unusual litigation. The character of harm that may flow from that suffered by other defeated litigants, their families, their employees, and their customers. The price of evenhanded administration of justice is especially high in some cases, but our duty to deal equally with the rich and the poor does not admit of a special exemption for multi-billion-dollar corporations or transactions.

Pennzoil Co. v. Texaco, Inc, 481 U.S. 1, 34, 107 S.Ct. 1519, 1538, 95 L.Ed.2d 1 (1987) (Stevens, J.,

concurring). We agree. The Constitution does not have two sets of provisions, one that operates at retail and another at wholesale. It offers no quantity discounts. The protection of the Bill of Rights apply the same regardless of the size of the crime or the identity of the criminal.

The present case is about remedies, and whether the Constitution permits the remedy the Government seeks. The Government claims to have suffered at Barnette's hands losses significantly in excess of the amount he paid in restitution. By granting Barnette's motion for summary judgment, the district court precluded the Government from proving its claim. When faced with an analogous situation, the *Halper* Court remanded to allow the Government to

present an accounting of its total loss. *Halper*, 490 U.S. at 452, 109 S.Ct. at 1903. Similarly, we now remand this case to the district court to allow the Government to demonstrate its total loss. *Cf. Mayers*, 897 F2.d at 1127 remanding under *Halper* for a factual determination of the Government's loss). The Government is entitled to introduce evidence regarding "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection an investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse." *Halper*, 490 U.S. at 445, 109 S.Ct. at 1900.[3] If the district

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3. We believe that *Halper's* broad description on ancillary costs include the cost of prosecution, which in this case must have been substantial, as well

court finds that the Government's total loss was $15.75 million, which is the amount it claims in direct loss alone, then a recovery of $50.5 million in damages (offset by the $7 million Barnette already paid in restitution) is not barred by the Double Jeopardy Clause. If the Government proves a lesser amount of total loss, than the district court should apply to its fact findings the same *Halper* analysis that we have applied in this opinion.

B. COLLATERAL ESTOPPEL

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as the cost of detection and investigation. The Court used illustrative ("such as") language, and the cost of prosecution doses "routinely attend the Government's efforts to root out deceptive practices." *See Halper*, 490 U.S. at 445, 109 S.Ct. at 1900. For these reasons, the district court should consider as part of the Government's total loss the cost of prosecution, if the Government proves that cost.

Barnette asserts that the doctrine of collateral estoppel bars the Government's civil damages action against him. That doctrine only precludes "relitigation of an issue of fact or law that has been litigated and decided in a prior suit." *I.A. Durbin, Inc. v. Jefferson Nat'l Bank,* 793 F.2d 1541, 1549 (11th Cir. 1986). Here, because the sentencing judge never determined the amount of the Government's loss, the doctrine of collateral estoppel is completely inapposite. We therefore need not determine if this case presents one of those rare exceptions to the general rule that collateral estoppel does not apply to the United States. *See, e.g., United States v. Killough,* 848 F.2d 1523, 1526 (11th Cir.1988).

C. RES JUDICATA

[4] Barnette asserts that the present action is barred under principles of res judicata. "[A] federal court must apply federal law to determine the preclusive effect of a prior federal court decision." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir.1990). The doctrine of res judicata in federal law prohibits "the filing of claims which were raised or could have been raised in an earlier proceeding." *Id.* Barnette assets that because the Government could have brought its civil claims as part of the criminal trial, res judicata bars this suit.

We have some doubts about the Government's ability to bring civil claims as part of a criminal proceeding. Barnette contends that *Halper* allow such a mixed action, but he points to no

statutory authorization for a hybrid proceeding of that sort. *Halper* says only that the ruling in that case does not prevent imposition of a civil penalty in a criminal trial. 490 U.S. at 450, 109 S.Ct. at 1903. We hardly think that this passing dicta renders moot other obstacles to such hybrid proceedings. These obstacles are one reason that the doctrine of res judicata often has been held not to bar a civil case brought subsequent to a criminal trial. *Cf., e.g., Standefer v. United States,* 447 U.S. 10, 23, & n. 18, 108 S.Ct. 1999, 2007 & n. 18, 64 L.Ed.2d 689 (1980) (holding that a "not guilty" verdict does not estop the Government in a subsequent civil case because, *inter alia,* "the prosecution's discovery rights in criminal cases are limited"); *Helvering*

v. Mitchell, 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917 (1938) ("The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*."). Furthermore, Barnette's res judicata theory ignores the result of *Halper* itself. There, the Supreme Court remanded a civil case for further fact finding in order to determine whether the civil remedy would be permitted, despite the fact that the defendant had already been prosecuted for the same conduct. *See* 490 U.S. at 452, 109 S.Ct. 1904. Under Barnette's reading of the *Halper* case, the *Halper* action itself would have been barred by res judicata. Yet the Supreme Court never mentioned that possibility. We will not interpret and apply dicta in a Supreme Court decision

in a way that is inconsistent with the disposition reached in that very decision.

Moreover, the VWPA expressly contemplates civil restitution claims brought subsequent to a criminal conviction. *See* 18 U.S.C.A. section 3579(e)(2) (1985). Barnette's approach would require us to render this provision of the VWPA irrelevant. The courts should not jam judicially created doctrines such as res judicata into the gears of Congress's carefully crafted statutory machinery.

There is one last reason to reject Barnette's res judicata defense. At sentencing, Barnette asserted that the Government was also seeking to recover its loss through a civil action, and he argued that a restitution order would

unfairly make him pay twice. After Barnette made that argument, the sentencing judge did not award as much restitution as the Government had requested. We will not now permit Barnette to defeat the Government's unsatisfied damages claims on the ground that the Government has already had one bite at the apple. To do so, in view of the arguments Barnette used during sentencing to reduce the amount of restitution, would allow him to have the Government's apple and eat it too.

In a related vein, Barnette points out that the district court seems to have based its summary judgment order in part on the Government failure to appeal the prior restitution award. The district court did not indicate why it attached any legal significance to this fact.

Whatever the court's reasoning, it assumed without discussion that the Government *could* have appealed. That is not at all clear to us, because three of the four restitution counts we upheld against Barnette's challenge on direct appeal were based on pre-VWPA law. Moreover, as we have already discussed, the doctrine of res judicata is not applicable in this case for other reasons. For those same reasons, it would not have been applicable even if the Government had attempted to appeal the restitution order. There is no basis in law or logic for saying that res judicata would not apply if the Government had attempted to appeal the restitution order, but that it does apply because the Government did not appeal. That is, however, essentially what

Barnette contends when he argues that res judicata is applicable because the Government did not attempt to appeal the restitution order. Finally, we note that Barnette has not cited any case from any jurisdiction that even hints that a prior criminal restitution order is res judicata against a subsequent damages action, regardless of whether the Government attempted to appeal the restitution order. We decline to be the first court to misapply the doctrine of res judicata in such a fashion.

D. THE GOVERNMENT'S PRAYER FOR INJUNCTIVE RELIEF

Seven of the eight counts in the Government's second amended complaint sought monetary relief. *See* Appendix. Count two, however, sought an injunction. The district court did not explain its

rationale for granting summary judgment on the count. To the extent that the district court rested its order as to Count Two on the same rationale that it applied to the Government's other claims, we reverse and remand for reasons already discussed. To the extent that summary judgment on Count Two was based on some unarticulated-and thus unreviewable-rationale, we must still remand for a specification of grounds. On remand, the district court will be free to reconsider Barnette's summary judgment motion as to this count. However, if the district court reenters summary judgment on Count Two, it should specify its grounds.

III. CONCLUSION

We REVERSE the district court's order granting Barnette summary judgment

and REMAND this case for further proceedings consistent with this opinion.

APPENDIX:
RELIEF SOUGHT BY PLAINTIFF UNITED STATES OF AMERICA

Count	¶	Brief Description of Claim	Relief Sought
1	33	RICO treble damages claim relating to laundry contract	$47,250,459: (three times alleged damages of "at least $15,750,153"), plus costs and fees
2	37	RICO injunctive relief claim relating to laundry contract	Order dissolving or reorganizing corporate defendants, barring certain individual defendants from holding interest in or exercising control over corporate defendants, and prohibiting certain defendants from bidding on Government contracts for a reasonable period
3	61	False Claims Act claim relating to laundry contract	$50,070,459: $47,250,459 (trebled damages), plus $2,820,000 in civil penalties ($10,000 for each of 282 false claims), plus costs
4	67	False Claims Act conspiracy claim relating to laundry contract	$18,570,153: $15,750,153 (single damages), plus $2,820,000 (civil penalties), plus costs
5	71	Breach of contract claim relating to laundry contract	$47,250,459 (trebled damages) plus costs
6	78	Unjust Enrichment claim relating to laundry contract and SBA contracts	$18,141,309: $15,750,153 (single damages), plus $2,391,156 (profits under SBA set-aside contracts to which defendants were not entitled), plus costs
7	82	Payment by mistake claim relating to laundry contract and SBA contracts	$18,141,309: $15,750,153 (single damages), plus $2,391,156 (profits under SBA set-aside contracts to which defendants were not entitled), plus costs
8	92	Contract annulment claim relating to laundry contract	$50,525,279: (gross amount of plaintiff's payments on contract modifications and extensions), plus costs

(2)

No. 93-1947

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

LARRY D. BARNETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court in petitioner's prior criminal prosecution made a factual finding that the full amount of the government's damages was $7 million.

2. Whether the criminal prosecution of petitioner and the partial restitution ordered as part of the criminal sentence preclude the government from recovering its actual damages from petitioner in a subsequent civil action.

3. Whether the Double Jeopardy Clause prohibits the government from recovering civil penalties and a statutory multiplier that are reasonably proportionate to the government's losses and costs.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Department of Revenue v. *Kurth Ranch*, 114 S. Ct. 1937 (1994)	9
Kurth Ranch, In re, 986 F.2d 1308 (9th Cir. 1993)	8
United States v. *Amiel*, 813 F. Supp. 958 (E.D.N.Y.), aff'd, 995 F.2d 367 (2d Cir. 1993)	8
United States v. *Barnette*, 800 F.2d 1558 (11th Cir. 1986), cert. denied, 480 U.S. 935 (1987)	2
United States v. *Halper*, 490 U.S. 435 (1989)	3, 7, 8
United States v. *Pani*, 717 F. Supp. 1013 (S.D.N.Y. 1989)	8

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause)	3, 4, 7, 8
False Claims Act, 31 U.S.C. 3729 (1992)	2
Victim and Witness Protection Act:	
18 U.S.C. 3579(e)(2) (1982)	5
18 U.S.C. 3663-3664	4
18 U.S.C. 3663(e)(2)	7, 8
18 U.S.C. 3664(e)	7

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B49) is reported at 10 F.3d 1553. The opinion of the district court (Pet. App. A1-A15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1994. On March 22, 1994, Justice Kennedy extended the time within which to file a petition for certiorari to and including May 2, 1994. On April 14, 1994, Justice Kennedy further extended the time within which to file a petition for certiorari to and including June 6, 1994. The petition was filed on June 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1977 and 1981, petitioner and his associates participated in a complex conspiracy to defraud the government in connection with a contract he obtained for providing laundry services for the United States Army in Germany.[1] Pet. App. B2. A jury convicted petitioner and his co-conspirators of a number of offenses, including racketeering, mail fraud, bribery, false statements, income tax evasion, and misapplication of government funds. *Id.* at B3.

At sentencing, the United States sought restitution of $15 million in excess profit. Pet. App. B3. Petitioner contended that his illegal profit was at most $6.8 million. *Ibid.* Declining to resolve the dispute, the district court ordered petitioner to pay restitution of $7 million, which was approximately the amount of his known net worth. *Id.* at B3, B23. The court also sentenced petitioner to five years' imprisonment and five years' probation. *Id.* at B3-B4.

The Eleventh Circuit affirmed petitioner's conviction and sentence. The court noted in its opinion that "the evidence introduced at trial established that the conspiracy netted approximately fifteen million dollars in excess profits from the German laundry contract alone." See *Barnette I*, 800 F.2d at 1571-1572.

2. The government subsequently filed the present civil suit. In a complaint that closely tracked the criminal indictment of petitioner and his co-conspirators, the government asserted claims under a number of federal statutes, including the False Claims Act, 31 U.S.C. 3729. Pet. App. B4-B5. The government claimed actual

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[1] The details of petitioner's crimes are recounted in *United States* v. *Barnette* (*Barnette I*), 800 F.2d 1558, 1560-1566 (11th Cir. 1986), cert. denied, 480 U.S. 935 (1987).

damages of at least $15 million, and sought recovery of statutory multiple damages, plus relevant civil penalties. *Id.* at B5; see also *id.* at B50 (summarizing bases for government's claims).

The district court granted petitioner's motion for summary judgment on the ground that the criminal restitution order of $7 million estopped the government from relitigating the amount of its damages in the instant civil action. Pet. App. A6. The court further concluded that in light of *United States* v. *Halper*, 490 U.S. 435 (1989), the Double Jeopardy Clause of the Fifth Amendment barred the government "from bringing this civil action which clearly alleges conduct identically prosecuted in a prior criminal proceeding." Pet. App. A13.

3. The court of appeals reversed the district court's grant of summary judgment in favor of petitioner and remanded the case for further proceedings to determine the amount of the government's losses. Pet. App. B1-B50.

As a threshold matter, the court found that the $7 million restitution order did not in fact constitute a judicial determination of the extent of the government's loss. The court noted that the sentencing judge had expressly disavowed any intention of making specific findings regarding the total amount of the government's loss. Pet. App. B10-B13. The court also emphasized that restitution orders serve a different purpose from civil damages, since restitution must take into account not only the victim's injury, but also factors such as the defendant's financial resources and the needs of his dependents. *Id.* at B13-B15. Finally, the court explained that the amount of the restitution order was approximately equal to petitioner's known net worth, see *id.* at B23, and that its review of the record revealed that

the sentencing court had simply determined "that [petitioner] could pay that amount," while "le[aving] final resolution of the Government's damages claim to the ensuing civil case." *Id.* at B15.

The court also rejected petitioner's argument that the sentencing judge's failure to explain the restitution order pursuant to the Victim and Witness Protection Act (VWPA), 18 U.S.C. 3663-3664, meant that the order was intended to make the government whole. Pet. App. B19. Although at the time of sentencing the VWPA required a court to explain a failure to order full restitution, see *id.* at B18, the court found that three of the four concurrent $7 million restitution orders were not governed by the VWPA, because those orders related to crimes that occurred before the effective date of the VWPA. *Id.* at B19-B20. The fourth restitution order should have been governed by the VWPA, but the court found that the government had mistakenly informed the sentencing court that the fourth order was not governed by the VWPA, and petitioner had failed to contest that assertion. *Id.* at B21. Moreover, the sentencing court's statements indicated that it was unaware of the requirements of the VWPA. *Id.* at B21-B22. Accordingly, nothing that occurred in the sentencing court suggested that the $7 million restitution order represented a factual finding concerning the full scope of the government's damages.

The court of appeals further held that the Double Jeopardy Clause does not prohibit any award of civil penalties in excess of the restitution order, but only those awards "so grossly disproportionate to the * * * loss suffered as to constitute deterrence or retribution instead of compensation." Pet. App. B26. While remanding for a factual determination of the extent of the government's loss, the court nonetheless compared

the asserted loss to the amount sought by the government in this case, in order to determine whether *Halper* precluded recovery as a matter of law. *Id.* at B28-B29. The court found that "the ratio between the amount that the Government is seeking and its direct loss is only 3.2 to 1—strikingly less than the 222 to 1 figure that so shocked the *Halper* Court." *Id.* at B34. While acknowledging that investigation and prosecution costs remained to be determined on remand, the court nonetheless found that the ratio between the total recovery sought and the government's total losses, including such costs, "would not exceed 3.2 to 1 * * * [and] will never approach *Halper*'s 8 to 1 ratio." *Id.* at B34-B35. Noting that the ratio between the government's total costs, if proven on remand, and its recovery in this case would at most approximate the fixed penalty and double damages explicitly approved in *Halper*, the court concluded that the penalties sought by the government were rationally related to the government's asserted loss, and therefore were not barred under *Halper*. *Id.* at B35.

Finally, the court rejected petitioner's argument that res judicata barred the present suit because the government failed to raise its civil claims during the criminal proceedings. The court pointed out that petitioner's reasoning would have entirely barred the civil action in *Halper* itself, in which the civil action followed a criminal prosecution for the same conduct. Pet. App. B43. The court further reasoned that the VWPA, 18 U.S.C. 3579(e)(2) (1982), expressly contemplates successive criminal and civil proceedings, and noted that petitioner himself relied on the existence of the pending civil action in attempting to reduce the amount of restitution. Pet. App. B44-B45. To bar this action "on the ground that the Government has already

had one bite at the apple," the court found, "would allow [petitioner] to have the Government's apple and eat it too." *Id.* at B45.

ARGUMENT

1. Petitioner renews his argument (Pet. 26) that the sentencing court determined that the government's damages were $7 million, and that the government is therefore precluded from basing its claim on a contention that its damages were higher. After a thorough review of petitioner's sentencing proceedings, the court of appeals rejected petitioner's premise that such a factual finding had been made. As the court of appeals explained, the district court did not expressly make such a finding, but instead disavowed having made it. Although perhaps the court should have made a finding about the extent of the government's damages in light of the VWPA's requirement that a court explain a failure to grant full restitution, the district court's failure to do so was thoroughly explicable in terms of the court's understanding of the statutory requirements at the time of the sentencing. In any event, further review of the fact-bound question of whether the sentencing court made the alleged finding is not warranted.[2]

2. Petitioner argues (Pet. 40-44) that, under the doctrine of res judicata, the government may not pursue a damages remedy against a defendant after it has prosecuted that defendant criminally. As the court of appeals noted, however, *Halper* itself involved a civil

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[2] Petitioner also appears to challenge the calculation of the government's loss, arguing that the government did not in fact incur any monetary loss (Pet. 33), and that any loss would not in any event be measured by petitioner's excess profits (Pet. 27). Such arguments are properly addressed to the district court on remand.

action that followed a criminal prosecution, and this Court's remand in *Halper*, see 490 U.S. at 452, would have been pointless if a prior criminal prosecution precludes the government from advancing a civil claim for damages. In addition, Congress specifically recognized in the VWPA that a criminal prosecution could be followed by a subsequent civil damages action. See, *e.g.*, 18 U.S.C. 3663(e)(2) (providing for set off of criminal restitution against subsequent civil damages); 18 U.S.C. 3664(e) (providing that criminal conviction has preclusive effect as to elements of underlying crime in subsequent civil action by victim). Petitioner provides no reason to disregard Congress's intent that the existence of the restitution remedy not preclude a subsequent civil action for damages.

3. Petitioner claims (Pet. 9-25) that an award of civil penalties plus a statutory multiplier in this case would constitute a double punishment in violation of the Double Jeopardy Clause of the Fifth Amendment. As this Court recognized in *Halper*, however, an otherwise-civil sanction does not rise to the level of punishment unless it "bears no rational relation to the goal of compensating the Government for its loss." 490 U.S. at 449-450. This Court explained that its holding in *Halper* represented "a rule for the rare case," *id.* at 449; the facts of *Halper* involved a False Claims Act award more than 220 times greater than the government's actual loss (and eight times greater than its total loss, including ancillary costs). See *id.* at 439, 452. The Court noted that "in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole." *Id.* at 449.

The court of appeals applied those principles, and concluded that if the government is able to prove its loss allegations on remand, a damages award in the full

amount sought by the government would not violate the Double Jeopardy Clause. Pet. App. B33-B36. In contrast to the 220:1 ratio in *Halper*, the amount the government seeks in this case is only 3.2 times the direct loss allegedly suffered by the government. The recovery sought appears even more reasonable if one employs the ratio of recovery to losses and ancillary costs, as petitioner suggests (Pet. 12); the government's ancillary costs of investigation and prosecution will bring the ratio even closer to the fixed sum plus double damages expressly approved in *Halper*. 490 U.S. at 446.[3]

Petitioner argues (Pet. 18-19) that the damages sought are inherently punitive because he "paid his entire net worth" to satisfy the restitution order. However, *Halper* teaches that a civil sanction does not constitute punishment unless that sanction is grossly disproportionate to the harm caused: The severity of any previously imposed criminal sanction is irrelevant. In any event, the VWPA explicitly provides (and the government conceded below) that the criminal restitution award would be set off against any civil damages awarded. 18 U.S.C. 3663(e)(2); see Pet. App. B5-B6.

Finally, petitioner claims that there is a conflict between the decision below and *In re Kurth Ranch*, 986 F.2d 1308 (9th Cir. 1993). In that case, the Ninth Circuit applied a *Halper* analysis to determine whether a state

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[3] At least two lower courts have approved damage awards under *Halper* with significantly higher sanction-to-damage ratios than respondent seeks in this case. See *United States* v. *Amiel*, 813 F. Supp. 958, 962 (E.D.N.Y.), aff'd, 995 F.2d 367 (2d Cir. 1993) (finding that a ratio of 18 to 1 between sanctions and actual losses was not punitive); *United States* v. *Pani*, 717 F. Supp. 1013, 1019 (S.D.N.Y. 1989) (holding that a recovery of $32,460 for claims causing $1280 in damage, a ratio of approximately 25 to 1, was not "overwhelmingly disproportionate" under *Halper*).

tax on marijuana assessed following a criminal prosecution must be regarded as compensatory or penal for double jeopardy purposes. In affirming the judgment of the Ninth Circuit in *Kurth Ranch*, however, this Court held that "subjecting Montana's drug tax to *Halper*'s test for civil penalties is * * * inappropriate," because "tax statutes serve a purpose quite different from civil penalties." *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994). The Ninth Circuit's application of *Halper* in *Kurth Ranch* accordingly has no continuing validity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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